NO. 13-19-237-CR

DALLAS S. CURLEE, Appellant,	§	COURT OF APPEALS
V.	§	FOR THE THIRTEENTH
THE STATE OF TEXAS, Appellee.	§	DISTRICT OF TEXAS

STATE'S RESPONSE TO CURLEE'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

The State agrees with Curlee that there is little precedent in Texas concerning the issue of whether a playground is "open to the public" for purposes of the drug free zone enhancement and that the present opinion, however the Court ultimately decides the issue, should be published. The State, like Curlee, stands on the arguments made in its brief. However, the State believes that it presented sufficient evidence to support the enhancement in the present case. For the Court's convenience, the relevant portions of the State's argument are repeated here, together with one additional consideration that the State believes is important to the analysis - that the civil doctrine of "attractive nuisance" is highly relevant to the underlying assumptions concerning the public nature of the playground in question.

I. Statement of Relevant Facts.

Officer Smejkal testified that the Curlee's van was located less than 600 feet from the First United Mathodist Church in Edna (RR vol. 4, p. 84), which included an outdoor playground open to the public and around which there was a four-foot fence without locks on the gates. (RR vol. 4, pp. 86-89) Officer Smejkal testified to his belief that the gates were kept unlocked at all times. (RR vol. 4, p. 102)

Upon being recalled later at trial, Officer Smejkal testified concerning a number of photographs of the gates to the playground in question, including one gate that clearly could not have been locked because there was no "place where you could utilize any type of locking system." (RR vol. 4, pp. 157-159 ; SX # 34-36)

State's Exhibit # 17 indicates a computer generated distance of 547 feet from the parked van to the First United Methodist Church Playground.

State's Exhibits # 18 – 23 show a typical children's playground, with slides, ladders, a tunnel, and climbing bars, as well as various toys left on the ground. It further appears to have open and unblocked access to surrounding properties.

II. Drug Free Zone Enhancement.

Ordinarily, punishment for the present third-degree felony, enhanced to by a prior conviction, would be subject to the second-degree range of 2-20 years. *See* Tex. Health & Safety Code § 481.115 (a) & (c); Tex. Penal Code § 12.42 (a). However, the drug free zone enhancement applies to raise the minimum period of confinement by five years if the offense was committed within 1,000 feet of a playground that, among other requirements, must have been "open to the public." Tex. Health & Safety Code § 481.134 (a)(3)(B).

III. Open to the Public.

Few cases have fleshed out the criteria for being "open to the public" for purposes of the drug free zone enhancement.[1]

In *Ingram v. State*, the Texarkana Court of Appeals concluded that, where there was no direct evidence that a privately-owned park was open to the public, the jury could not reasonably infer that it was "open to the public" for purposes of the drug free zone enhancement. 213 S.W.3d 515, 518–19 (Tex. App.—Texarkana 2007, no pet.).

---

[1] With regard to Penal Code offenses, the Penal Code defines "public place" as "any place to which the public or a substantial group of the public has access." Tex. Penal Code § 1.07 (a)(40); *see Banda v. State*, 890 S.W.2d 42, 52 (Tex. Crim. App. 1994); *see also Beeman v. Livingston*, 468 S.W.3d 534, 539–40 (Tex. 2015) ("public," when used as an adjective, means "open and accessible to the public").

On the other hand, in *Graves v. State*, the Houston Fourteenth Court of Appeals concluded that the jury could reasonably infer that an area that witnesses described as a "park," and which was open and accessible from a public street, was "open to the public." 557 S.W.3d 863, 867 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

It appears at least from *Graves* that the general nature of the place in question (there, a "park"; here, a church playground), coupled with its being open and accessible to the public, may lead to a reasonable inference that it is "open to the public" for purposes of the enhancement.

The jury may use common sense and apply common knowledge, observation, and experience gained in ordinary affairs when drawing inferences from the evidence. *See Acosta v. State,* 429 S.W.3d 621, 625 (Tex. Crim. App. 2014); *Hooper v. State,* 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Concerning the public nature of a church, the Court of Criminal Appeals has said, "We see no valid distinction, insofar as the law of burglary is concerned, between a church, into which the public has consent to enter for the purpose of meditation and prayer, and a place of business, into which the public has consent during business hours to enter for the purpose of

transacting business." *Trevino v. State*, 254 S.W.2d 788, 789 (Tex. Crim. App. 1952) (on rehearing).

Since the earliest times, churches have been a source of charity and good will to the community, and an open playground at a church is surely one means by which that church extends its good will to the community it serves. And, just as the open and accessible sanctuary carries with it an implicit invitation for the public to enter for the purpose of meditation and prayer, an open and accessible playground adjacent to the church with no apparent or posted restrictions carries with it an invitation for children to play there.

In the present case, it is clear from the exhibits that even short little hands can open the gate in question to enter and play. And when such a playground is not locked or otherwise obviously restricted, it is "open" as far as children in the neighborhood as concerned, whether or not they have a formal invitation to play there.

Accordingly, the State presented legally sufficient evidence to prove that the playground in question was open to the public.

Alternatively, even if this Court should determine that the State presented insufficient evidence to support the drug free zone enhancement at the first trial, this should not prevent it from attempting to prove up that

same enhancement at a second trial on punishment. When a reviewing court determines that the State's evidence fails to show that an enhancement allegation is true, the Double Jeopardy Clause does not bar the use of the enhancement conviction during a retrial on punishment. *Jordan v. State*, 256 S.W.3d 286, 292 (Tex. Crim. App. 2008) (citing *Monge v. California,* 524 U.S. 721, 734, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998)).

IV. The Attractive Nuisance Doctrine.

In addition to the arguments already made in its brief and repeated here for convenience, the State believes that the doctrine described below is highly relevant to the status of the children playing on the grounds of the church as invitees, and thus as members of the public implicitly "invited" to use the playground, which in turn must be considered as making that playground "open to the public."

The Texas Supreme Court has explained the "attractive nuisance" doctrine as follows:

> However, "when children of tender years [come] upon the premises by virtue of their unusual attractiveness, the legal effect [is] that of an implied invitation to do so. Such child [is] regarded, not as a trespasser, but as being rightfully on the premises." *Banker v. McLaughlin,* 146 Tex. 434, 208 S.W.2d 843, 847 (1948). This is the doctrine of attractive nuisance. It originally developed in so-called "turntable cases" where young children were injured playing on railroad turntables which seemed especially attractive playgrounds, the dangers of which children did not appreciate. *See, e.g., (Sioux City & Pac.) Railroad Co. v. Stout,* 84 U.S. (17 Wall.) 657, 21 L.Ed. 745 (1873); *Evansich v. Gulf, C. & S.F. R'y,* 57 Tex. 123 (1882).

The doctrine has since been extended to other situations, as we explained in *Banker:*

> "The theory of liability under the attractive nuisance doctrine is that, where the owner maintains a device or machinery on his premises of such an unusually attractive nature as to be especially alluring to children of tender years, *he thereby impliedly invites such children to come upon his premises, and, by reason of such invitation, they are relieved* from being classed as trespassers, but are in the attitude *of being rightfully on the premises.* Under such circumstances, the law places upon the owner of such machinery or device the *duty of exercising ordinary care* to keep such machinery in reasonably safe condition for their protection, if the *facts are such as to raise the issue that the owner knew, or in the exercise of ordinary care ought to have known, that such* children were likely or would probably be attracted by the machinery, and thus be drawn to the premises by such attraction." (Emphasis ours.)
>
> The "attractive-nuisance", or so-called turntable doctrine, is applicable to cases involving different dangerous instrumentalities and conditions on the premises.

208 S.W.2d at 847–848. When the attractive nuisance doctrine applies, the owner or occupier of premises owes a trespassing child the same duty as an invitee.

Texas Utilities Electric Co. V. Timmons, 947 S.W.2d 191, 193 (Tex. 1997).

PRAYER

For the foregoing reasons, the State respectfully requests that this Court deny the motion for rehearing, affirm the judgment of the trial court, and order that its opinion be published.

Respectfully submitted,

/s/ Douglas K. Norman

_____

Douglas K. Norman
State Bar No. 15078900
Special Prosecutor
Jackson County District Attorney
115 W. Main Street, Ste 205
Edna, Texas 77957
(361) 782-7170
douglas.norman@nuecesco.com

RULE 9.4 (i) CERTIFICATION

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this response, excluding those matters listed in Rule 9.4(i)(1), is 1,530.

/s/ Douglas K. Norman

_____

Douglas K. Norman

CERTIFICATE OF SERVICE

This is to certify that a copy of this response was e-served on May 23, 2020, on Appellant's attorney, Mr. Luis Martinez, at Lamvictoriacounty@gmail.com.

/s/ Douglas K. Norman

_____

Douglas K. Norman

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Douglas Norman
Bar No. 15078900
douglas.norman@nuecesco.com
Envelope ID: 43203931
Status as of 05/26/2020 08:24:36 AM -05:00

Associated Case Party: DallasShaneCurlee

Name	BarNumber	Email	TimestampSubmitted	Status
Luis Adrian Martinez	24010213	lamvictoriacounty@gmail.com	5/23/2020 6:47:25 PM	SENT

Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Pamela Eikenbary Guenther	8570500	p.guenther@co.jackson.tx.us	5/23/2020 6:47:25 PM	SENT
Douglas Norman		douglas.norman@nuecesco.com	5/23/2020 6:47:25 PM	SENT